IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21512

CLINTON ROY PETRIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

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Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on May 21, 1968, affirming the judgment of the Court below.

Appellant respectfully asks that the decision of May 21, 1968, be reheard by an en banc Court,* for the reason that essential portions of it are contrary to recent holdings of this Court, particularly *Miller* v. *United States,* 9th Cir., 1967. *Miller* is not mentioned. It is to be recalled that

*Counsel has never before made such a request in any of the several score matters he has had before this Court.

this case (*Petrie*) was argued in the Fall of 1967, before the *Miller* decision was decided by another panel.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion should be revised.

I

THE III-A SITUATION

There are two subdivisions to this point, and both merit further thought.

A. The fact that the local board withheld pertinent information from the appeal board.

The Court said:

> "It is appropriate first to dispose of the contention that 'the appeal board improperly classified appellant I-O in June, 1965, because the local board failed to notify . . . [the appeal board] of the intervening facts that removed appellant from consideration for Class I-O and entitled him to classification in Class III-A.'" [Slip op., p. 61].

The Court disposed of appellant's contention by referring to the regulations, as follows:

> "Since the appeal board would have been precluded from considering any such additional information outside the record forwarded to it at the time of the appeal, this contention is devoid of merit. 32 C.F.R. §§ 1626.14, 1626.24 (b)."

Assuming that it is correct that the appeal board can at any one occasion, only consider what comes initially from the local board the dereliction of the local board is nevertheless clear because the record shows that this appellant's processing, by the local board, continued for more than a year thereafter; that the local board, therefore, had more opportunities to see that the new information presented by Petrie went to the appeal board so that this registrant could have had an appellate determination on the June, 1965, "intervening facts" pertaining to this III-A hardship claim [Government Exhibit, pages 12-13, the Minutes of Action].

B. The failure of the local board to reopen.

The Court said "We turn, therefore, to Petrie's contention that, assuming the truth of the facts presented to the local board, the decision not to reopen his classification was improper."

"Our scope of review over the local board's classification decision is well defined. However strongly we may disagree with the appropriateness of the local board's classification decision, we may overturn the classification only if it has 'no basis in fact.'" [Slip op., p. 6].

The Court is asked to reconsider this failure to reopen because the decision is in direct conflict with *Miller* v. *United States*, 9 Cir., 1967, 388 F.2d 973. In *Miller* it was pointed out that the no-basis-in-fact doctrine is not applicable to a reopening situation, but only to a classification situation.

II

THE II-A SITUATION

The court used an incorrect standard in rejecting appellant's claim.

A. The court said:

> ". . . it was not demonstrated that he could not be replaced." [Slip op., p. 8].

Where does the law require "demonstration"? This is an impossible burden and an unheard of one until now.

The law requires only a prima facie showing. *Dickinson* v. *United States,* 74 S.Ct. 152 (1953). There is nothing in the record to diminish the appellant's prima facie showing. The *Petrie* decision is also contrary to the principle stated by this Court in *Franks* v. *United States,* 9 Cir., 1954, 216 F.2d 266: ". . . we must view the record in the light most favorable to the appellant . . ." [269].

B. The court concluded:

> ". . . it would yet remain necessary for the board to find that the character of the occupation was such as to make the registrant's continued pursuit of it 'necessary to the maintenance of the national health, safety, or interest.' We hold that there was justification for the determination that the occupation of flight instructor at the Valley Pilots Flying Service was not an occupation 'necessary to the maintenance of the national health, safety, or interest." [Slip. op., p. 8].

No citation is given for the conclusions above stated, namely, (1) that the board was required to make an affirmative finding or (2) that there was "justification"

for the implied finding of the board that flight instruction was not an occupation valuable to the national interest. The record showed that the Valley Pilots Flying Service met the requirements of the law (32 C.F.R. § 1622.23 (a)) with the required factual allegations (Ex. 143).

It is common knowledge (1) that pilots, especially helicopter pilots are a national need, because of the Vietnam demands and (2) that civilian needs, such as the demands of the Gulf of Mexico oil work must be met; moreover, the record supports this "common knowledge" statement (Ex. 143-144).

III

THE II-S SITUATION

Here again we are faced with a reopening situation, as distinguished from a classification situation and we again argue that *Miller,* supra, controls.

Here again the Court based its decision on the inapplicable no-basis-in-fact doctrine.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

Respectfully submitted,

J. B. Tietz
Attorney for Appellant

December 19, 1968.